



University of Kentucky
UKnowledge

1970-1979

Briefs

3-11-1976

General Welding Company, et al v. James E. Pugh, Deceased, etc., et al

Appellee's Brief 1975-SC-1133

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Follow this and additional works at: https://uknowledge.uky.edu/ky_appeals_briefs70s

 Part of the [Courts Commons](#)

Repository Citation

1975-SC-1133, Appellee's Brief, "General Welding Company, et al v. James E. Pugh, Deceased, etc., et al" (1976). 1970-1979. 346.
https://uknowledge.uky.edu/ky_appeals_briefs70s/346

This Brief is brought to you for free and open access by the Briefs at UKnowledge. It has been accepted for inclusion in 1970-1979 by an authorized administrator of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.



KYSC1975-SC-1133-03

{860B6879-3635-4CBF-98A7-1D6A086C9C77}

{134937}{54-130306:141842}{031176}

APPELLEE'S BRIEF

SUPREME COURT OF KENTUCKY

FILE NO. 75-1133

GENERAL WELDING COMPANY, ET AL

APPELLANTS

VS.

RUBY PUGH, WIDOW OF JAMES PUGH,
DECEASED, ET AL

APPELLEES

APPEAL FROM JEFFERSON CIRCUIT COURT
COMMON PLEAS BRANCH, THIRD DIVISION
HON. E. SKILES JONES, JUDGE, PRESIDING

BRIEF FOR APPELLEE, RUBY PUGH

FILED

MAR 11 1976

MARTHA LAYNE COLLINS
CLERK
SUPREME COURT

ROBERT M. LINDSAY
JOHN FRITH STEWART
SEGAL, ISENBERG, SALES, STEWART & NUTT
Third Floor, Marion E. Taylor Bldg.
Louisville, Kentucky 40202
Telephone: 587-8885

ATTORNEYS FOR APPELLEE, RUBY PUGH

It is hereby certified that copies of the within brief were served this 26th day of February, 1976, on: Hon. James M. Graves and Hon. William P. Swain, 2300 Louisville Trust Bank Building, One Riverfront Plaza, Louisville, Kentucky 40202, Counsel for Appellant, General Welding Company; Hon. Robert F. Stephens, Attorney General, Frankfort, Kentucky 40601, Counsel for Appellant, Workmen's Compensation Board; Hon. Gemma M. Harding, c/o Department of Labor, 310 Legal Arts Building, 200 South Seventh Street, Louisville, Kentucky 40202, Counsel for Appellee, George Wagoner, Acting Commissioner of Labor and Custodian of the Special Fund; and Hon. E. Skiles Jones, c/o Jefferson Circuit Court, Common Pleas Branch, Third Division, Jefferson County Courthouse, Fifth and Jefferson Streets, Louisville, Kentucky 40402, the Trial Judge, pursuant to RCA 1.250.


ATTORNEY FOR APPELLEE, RUBY PUGH

TABLE OF CONTENTS AND AUTHORITIES

	Page
STATEMENT OF QUESTION PRESENTED	ii
COUNTERSTATEMENT OF PROCEEDINGS BELOW	1-2
Young v. Pugh, 463 SW2d 928 (1971)	1
COUNTERSTATEMENT OF FACTS	2-6
Young v. Pugh, 463 SW2d 928 (1971)	3
ARGUMENT	6-9
WHETHER THE WORKMEN'S COMPENSATION BOARD ABUSED ITS DISCRETION AND/OR AS A MATTER OF LAW ERRED IN REFUSING TO ENTER AN AWARD IN FAVOR OF THE APPELLEE, RUBY PUGH, FOR CONTINUATION OF THE BENEFITS GRANTED HER HUSBAND BEFORE HIS DEATH . . .	6
Manchester Coal Co. v. Haynes, 212 SW2d 315	7
Hall v. Banks, 395 SW2d 776	8
Johnson v. Stone, 357 SW2d 844	9

STATEMENT OF QUESTION PRESENTED

WHETHER THE WORKMEN'S COMPENSATION BOARD ERRED IN DISMISSING DECEDENT'S WIDOW'S CLAIM FOR CONTINUATION OF BENEFITS IN THE FACE OF UNCONTRADICTED EVIDENCE THAT THE DIABETIC CONDITION WHICH CONTRIBUTED TO HIS INITIAL INJURY ULTIMATELY AND SUBSTANTIALLY CONTRIBUTED TO THE FATAL CEREBRIAL INFARCTION.

APPELLEE CONTENDS THE ANSWER IS "YES".

SUPREME COURT OF KENTUCKY

File No. 75-1133

GENERAL WELDING COMPANY, et al

APPELLANTS

-vs-

RUBY PUGH, Widow and sole dependent
of JAMES E. PUGH;
GEORGE WAGGONER, Commissioner of Labor
Custodian for the Special Fund

APPELLEES

BRIEF FOR APPELLEE,
RUBY PUGH

COUNTERSTATEMENT OF PROCEEDINGS BELOW

1. On November 17, 1969, the Workmen's Compensation Board entered its original Order and Award in favor of James E. Pugh, now deceased, and awarded him total and permanent disability benefits of \$47.00 a week from the employer (for the period November 6, 1968, to March 16, 1969) and the balance of said award from the Special Fund from and after November 6, 1968;

2. The case was then appealed through Circuit Court to the Court of Appeals and on March 22, 1971, the Court of Appeals issued its mandate reversing that portion of the Award which assessed liability against the Special Fund and held the employer liable for the entire total disability award from the date of the injury (November 4, 1968) for a period not to exceed 425 weeks.

(See Young v. Pugh, 463 SW2d 928 (1971))

On March 25, 1971, the defendant made a Motion To Terminate Award based upon the death of James E. Pugh on October 20, 1970, and in support thereof filed a certified copy of the death certificate of James E. Pugh.

Thereafter, Ruby Pugh, decedent's widow, filed a motion for continuation of the Award pursuant to KRS 342.111.

Proof in chief was taken consisting of testimony of the surviving spouse of the decedent, James Pugh, and the medical deposition of Dr. Robert S. Howell, pathologist.

On March 25, 1974, the Kentucky Workmen's Compensation Board entered an Opinion and Award dismissing the plaintiff's claim for continuation of benefits. (T.R. pp 5-7)

On April 11, 1974, Appellee, Ruby Pugh, appealed to Jefferson Circuit Court (T.R. p 2-4) and on October 14, 1975 Circuit Court overruled the decision of the Board and remanded said case with directions to enter an award of total death benefits to the Appellee, Ruby Pugh (T.R. p 13).

The Appellant has appealed from that decision.

COUNTERSTATEMENT OF FACTS

The Appellee takes no great exception to the facts presented by the Appellant. Only she would like to add some additional ones which were omitted.

Basically, the decedent had earlier suffered a puncture injury of his right great toe. This injury in conjunction with decedent's preexisting "active" diabetes caused complication which resulted in the amputation of decedent's right leg below the knee and resulted in total disablement. Young v. Pugh, Ky., 463 SW2d 298.

At a hearing held on February 4, 1972, Ruby Pugh, widow and sole dependent of the deceased, James E. Pugh, testified that she had been married to the decedent May 31, 1968, (T.E. 2/4/72 p 9).

At the time of his death on October 20, 1970, she was still married to the decedent, having lived with him the entire period of time, having been dependent upon him for his support (T.E. 2/4/72 p 9) (Pugh depo 7/12/73 p 3)

With relation to her husband's physical condition from the time of the amputation of his leg below the knee, which occurred on March 8, 1968, Mrs. Pugh testified that when he first came out of the hospital he was his old self and then he gradually started "going down". (Pugh depo 7/12/73 pp 4, 5)

She described this as meaning that his appetite declined so that where previously he had been a big eater "he got so he'd just pick. He just wouldn't eat ... But then he got so he wouldn't eat nothing." (Pugh depo 7/12/73 p 5)

Additionally the plaintiff testified that they had had good communication between them prior to the operation but that after the operation he would get so he wouldn't even answer her or respond in any manner "he'd just, just stare ahead or --" (Pugh depo 7/12/73 p 6)

He continued to take his insulin even after the operation' and apparently did not vary the dosage up until the time of his stroke (Pugh depo 7/12/73 p 7).

Further, the widow explained that his physical appearance changed and that he looked paler and lost weight, "How can you explain when you can look at someone and see they're wilting away." (Pugh depo 7/12/73 p 8)

The widow described the decedent's condition as like a "zombie" and described that he would constantly walk up and down on the porch rubbing his forehead (Pugh depo 7/12/73 pp 9, 10)

She further testified that he would sit down and simply drift off to sleep which he had never done previously (Pugh depo 7/12/73 p 12)

The only medical testimony in this case was the deposition of Dr. Robert S. Howell, a pathologist at Jewish Hospital.

Dr. Howell testified that the plaintiff was admitted to Jewish Hospital on October 14, 1970, somewhat drowsy and unable to move his left upper extremity and showing marked weakness of the left lower extremity. (Howell p 5)

The patient showed some slight improvement after admission but gradually became less responsive until October 19, 1970 he became comatose and expired on October 20, 1970 at 7:35 p.m.

After performing an extensive autopsy Dr. Howell testified that his final diagnosis was:

"1. Cerebral infarction, right, frontal parietal area, recent; 2. Lobular pneumonia, bilateral; 3. Pulmonary adema and congestion; 4. Diabetes mellitus; 5. Coronary atherosclerosis, severe; 6. Myocardial infarct, old, left ventricular wall; 7. Aortic atherosclerosis, moderate; 9. Atherosclerotic aneurysm of celiac artery; 10. Below the knee amputation of right leg; 11. Diffuse and nodular glomerulosclerosis; 12. Benign prostatic hyperplasia, mild; 13. Left ventricular hypertrophy, mild; 14. Pulmonary atherosclerosis, moderate." (Howell depo pp 13,14)

Dr. E. W. Callahan, a fellow pathologist made the following comment:

"This fifty-six year old diabetic white male had advanced vascular disease manifested by myocardial infarction and evidence of severe coronary atherosclerosis with accompanying generalized atherosclerosis and secondary recent cerebral infarct with complicating bilateral lobular bronchial pneumonia." (Howell depo p 14)

Dr. Howell testified that the cause of death was cerebral infarction, which involved the right frontal parietal area, with a subsequent development of acute lobular pneumonia (Howell, p 16).

Then Dr. Howell was asked the following question with regard to the contribution of the diabetes mellitus to the decedent's death:

"Q15 Now, Doctor, based upon your study of these records and the autopsy report and all my questions will be predicated on that.

In your opinion, did the diabetes mellitus, which I believe was found upon the autopsy, play any part, however great or small, in the subsequent cause of death which you have described to us?

A. Yes, I think it played a substantial part in the cerebral infarction, in that we know that diabetes mellitus usually will accentuate atherosclerosis or hardening of the arteries to a great extent." (Howell p 16)

....

Q64. And if I understand your testimony correctly now, tell me if I'm wrong, the diabetes which this patient had had for many years, was simply a factor that may be said to --

A (Interrupting) Accentuate.

Q65 (Continuing) -- accentuate or aggravate the atherosclerotic changes?

A Yes

Q66 And that's the sole connection of diabetes with his death?

A Diabetes will cause a premature atherosclerosis." (Howell pp 23, 24)

ARGUMENT

WHETHER THE WORKMEN'S COMPENSATION BOARD ABUSED ITS DISCRETION AND/OR AS A MATTER OF LAW ERRED IN REFUSING TO ENTER AN AWARD IN FAVOR OF THE APPELLEE, RUBY PUGH, FOR CONTINUATION OF THE BENEFITS GRANTED HER HUSBAND BEFORE HIS DEATH.

The decedent, James E. Pugh suffered his work injury on November 4, 1968. He died on October 20, 1970.

The applicable statute KRS 342.111 reads inter alia:

"(1) When an employee, who has been awarded disability compensation by the Workmen's Compensation Board, shall die as a result of such injury or occupational disease, prior to the payment to him of the amount of the award, then the dependents of the deceased employee shall be allowed and pay all allowed and unpaid awards made to such employee"

Appellee argues that the Court should look only to the

puncture wound on his right great toe and since he didn't die as a "result" of this puncture wound, then his widow is entitled to no benefits.

It should be noted that the medical proof in the earlier case showed that a work injury (a cut on the toe) in combination with diabetes caused his wound to fail to heal necessitating the amputation of his leg. Thus, the diabetic condition is inextricably bound with the cut that he suffered on his toe on November 6, 1968, his subsequent total disablement and eventual death!

Had there been no diabetes, there would have been no amputated leg and no death.

The plaintiff's proof shows that after being dismissed from the hospital following the amputation of his limb the decedent got worse and worse until he died on October 20, 1970.

Dr. Robert Howell testified unequivocally that diabetes played a substantial part in his death in that it accentuated atherosclerosis or hardening of the arteries to a great extent (Howell p. 16).

In two similar cases our Court of Appeals has ruled in favor of the dependent seeking to receive the remainder of the benefits due after death of the workman.

In Manchester Coal Co. v. Haynes, 212 SW2d 315, the workman was paralyzed from the hips down and died of broncho-pneumonia. Medical evidence was taken which showed that it was the workman's weakened condition, directly resulting from the injury and his inability to properly care for himself that caused his pneumonia. This Court then affirmed the judgment in

favor of the dependent.

Later, in Hall v. Banks, 395 SW2d 776, a workman broke his back which caused paralysis from the waist down. No medical evidence was presented but lay witnesses testified that the decedent remained in a painful and agonizing condition until his death.

Our Court held in favor of the dependent and stated:

"The cause of death in the present case is manifest. An able bodied man was severely injured in an accident which paralyzed half his body. There was substantial and uncontroverted testimony with respect to the gradual worsening of his condition as indicated by symptoms observable to the ordinary person. It was further established that no visible physical change in condition which could be attributed to a cause other than the accident occurred before death. Under these circumstances a finding that Bank's death was not the result of the accident would be based on surmize and conjecture."

In the instant case we have an identical situation where after a work injury which resulted in the amputation of his leg the decedent continued to progressively deteriorate until he finally died of cerebral atherosclerosis substantially accentuated by his diabetes.

These two cases also reveal that this Court has never accpeted the narrow view argued by the appellants of looking only to the specific work injury to ascertain if it resulted in death.

Thus in Manchester, the workman didn't die of paralyzed hips but from subsequent complications.

Similarly in Hall the workman didn't die of a broken back but from a subsequent decline of his general physical condition.

The medical proof unequivocally and uncontradictedly shows that the pre-existing diabetes mellitus in conjunction with his injury caused his leg to be amputated, and then made his atherosclerosis worse which ultimately caused his death.

It has been held in cases of uncontradicted medical proof that the Board is required to find a judgment in conformity with said uncontradicted proof. See Johnson v. Stone, 357 SW2d 844.

WHEREFORE, plaintiff respectfully prays that the judgment of the Workmen's Compensation Board be reversed and that the case be remanded to the Workmen's Compensation Board with directions to enter an award for the continuation of benefits originally awarded to James E. Pugh prior to his death.

Respectfully submitted,

SEGAL, ISENBERG, SALES, STEWART & NUTT

ROBERT M. LINDSAY AND JOHN FRITH STEWART
Third Floor, Marion E. Taylor Bldg.
Louisville, Kentucky 40202
Telephone: 587-8885

ATTORNEYS FOR APPELLEE, RUBY PUGH